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No. 03-878

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

PHIL CRAWFORD, INTERIM FIELD OFFICE DIRECTOR, PORTLAND, OREGON, UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT, ET AL.,

Petitioners,

v.

SERGIO SUAREZ MARTINEZ,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF OF STUART E. EIZENSTAT AND THOMAS W. PICKERING IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICI 1

ARGUMENT 3

I. THE INTERESTS ASSERTED BY THE GOVERNMENT DO NOT JUSTIFY INTERPRETING SECTION 1231(a)(6) TO AUTHORIZE THE INDEFINITE DETENTION OF ARRIVING ALIENS WHO CANNOT BE REMOVED. 3

A. Congress has already established mechanisms to protect against risks to national security posed by arriving aliens. 3

B. Interpreting Section 1231(a)(6) as in *Zadvydas* will not precipitate a flood of refugees. 10

C. The crime-prevention rationale rejected in *Zadvydas* should be rejected here as well. 12

II. TREATING ALIENS PAROLED INTO THIS COUNTRY LIKE ALIENS "STOPPED AT THE BORDER" IS ARTIFICIAL AND UNJUSTIFIABLE 15

CONCLUSION 16

TABLE OF AUTHORITIES

Federal Cases

Demore v. *Kim*, 538 U.S. 510 (2003) 13
INS v. *Chadha*, 462 U.S. 919 (1983) 8
United States ex rel. Schwarzkopf v. *Uhl*, 137 F.2d 898 (2d Cir. 1943) 7
Zadvydas v. *Davis*, 533 U.S. 678 (2001) ..... *passim*

Federal Statutes and Regulations

8 U.S.C. 1182(a)(2) 7
8 U.S.C. 1226 7
8 U.S.C. 1226a 5
8 U.S.C. 1226(c) 7
8 U.S.C. 1227(a)(2) 7
8 U.S.C. 1231(a)(3) 4, 5
8 U.S.C. 1231(a)(6) ..... *passim*
8 U.S.C. 1253(b) 5
8 U.S.C. 1537 7
50 U.S.C. 21 6
50 U.S.C. 23 7
8 C.F.R. 1.1(q) 2, 4
8 C.F.R. 241.13(h) 5
8 C.F.R. 287.3 6

Foreign Cases and Materials

R. v. *Governor of Durham Prison, ex parte Singh*, 1 W.L.R. 704 (Q.B. 1983), *available at* 1983 WL 216080 8
Suresh v. *Canada*, [1998] 4 F.C. 192 9

Tan Te Lam v. *Superintendent of Tai A Chau Detention Centre*, [1997] A.C. 97 (U.K. Privy Council), *available at* 1983 WL 216080. 9
Netherlands Aliens Act 2000, Articles 57-59 9

Legislative Materials

PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001) 5

Miscellaneous

Department of Homeland Security: Travel & Transportation (last modified July 26, 2004), *available at* http://www.dhs.gov/dhspublic/ interapp/content_multi_image/content_multi_image_0006.xml 4

INTEREST OF AMICI [1]

Amici are former government officials with broad experience in policy areas implicating national security and foreign relations.

Ambassador Eizenstat was President Carter's Domestic Policy Adviser and was deeply involved in the handling of the Mariél boatlift. Under President Clinton he was Ambassador to the European Union; Deputy Treasury Secretary; Under Secretary of State for Economic, Business and Agricultural Affairs; and Under Secretary of Commerce for International Trade.

Ambassador Pickering was Under Secretary of State for Political Affairs during the Clinton Administration. He holds the personal rank of Career Ambassador, the highest in the Foreign Service. He has been Ambassador to the Russian Federation, Israel, El Salvador, and Nigeria, among other nations. During the Kennedy Administration he served in the Bureau of Intelligence and Research of the State Department.

SUMMARY

In *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), the Court declined to interpret Section 1231(a)(6) to authorize the indefinite detention of an *admitted* alien who is subject to a removal order if there is no country to which the alien can be removed. In this case, the government contends that national security, border control, and public

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk. No counsel for a party authored this brief in whole or in part and no person or entity other than amici or their counsel made a monetary contribution to its preparation or submission.

safety concerns justify interpreting Section 1231(a)(6) to authorize the indefinite detention of aliens "stopped at the border" who cannot be removed—including aliens paroled into this country who have lived here for decades—even though Section 1231(a)(6) does not distinguish between the two classes of aliens.

The government advanced similar arguments for recognizing indefinite detention authority in *Zadvydas*. The Court found those arguments wanting in that case, and they fare no better here. The interests asserted by the government do not justify interpreting Section 1231(a)(6) to authorize indefinite detention of "arriving aliens" (see 8 C.F.R. 1.1q) whose countries will not take them back.

The government asserts that it requires indefinite detention authority to protect against threats to national security that arriving aliens may pose. Congress, however, has already provided mechanisms to protect against such threats. If these mechanisms are deemed to be insufficient, Congress can augment them.

The government asserts that it requires indefinite detention authority to deter foreign countries from thrusting their unwanted citizens onto our shores, and to deter desperate citizens of foreign countries from attempting migration to this country by any and all means. The government, however, has failed to show that the risk of indefinite detention would act as such a deterrent.

The government asserts that it requires indefinite detention authority to incapacitate criminal aliens and to deter aliens from committing crimes. These goals, however, can be achieved through the criminal justice system. There is no need to vest the Executive in this area with the power to prosecute, judge, and punish.

At all events, the purposes identified by the government cannot justify interpreting Section 1231(a)(6) to authorize the indefinite detention of paroled aliens like Respondent who—far from being "stopped at the border"—were welcomed into this land with open arms as refugees from tyranny. Notwithstanding Respondent's misdeeds, the Court has recognized that such aliens stand on a different footing than those denied entry.

The government asserts that if it cannot indefinitely detain paroled aliens like Respondent, whom it wishes to, but cannot, remove, it may be forced to curtail the exercise of its parole authority. We prefer to think that a "decent, civilized, and humane" government (Gov't Br. 22) would not punish the many for the potential sins of the few, and the government does not need to take such punitive action to protect its interests.

ARGUMENT

I. THE INTERESTS ASSERTED BY THE GOVERNMENT DO NOT JUSTIFY INTERPRETING SECTION 1231(a)(6) TO AUTHORIZE THE INDEFINITE DETENTION OF ARRIVING ALIENS WHO CANNOT BE REMOVED.

A. Congress has already established mechanisms to protect against risks to national security posed by arriving aliens.

The government contends that interpreting Section 1231(a)(6) here as the Court did in *Zadvydas* would leave "a large 'unprotected spot in the Nation's armor.'" Gov't Br. 42 (citation omitted). The Court rejected that contention in *Zadvydas*. The Court should reject it here.

Congress has established extensive mechanisms to protect the nation from arriving aliens who might pose a

threat to national security.[2] Upon reaching the U.S. border, aliens traveling to the U.S. on a visa must, as part of the US-VISIT program, have both of their index fingers scanned and a digital photograph taken to verify their identity at the port of entry. See Department of Homeland Security: Travel & Transportation (last modified July 26, 2004), *available at* http://www.dhs.gov/dhspublic/interapp/content_multi_image/content_multi_image_0006.xml. Aliens released into the United States who are ordered removed but cannot be are subject to constant oversight under Section 1231(a)(3), which provides for the continuous supervision and monitoring of arriving aliens who are conditionally released. Sections 1231(a)(3)(C) & (D) require an alien "to give information under oath about the alien's nationality, circumstances,

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[2] The term arriving alien means an applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry, or an alien interdicted in international or United States waters and brought into the United States by any means, whether or not to a designated port-of-entry, and regardless of the means of transport. An arriving alien remains such even if paroled pursuant to section 212(d)(5) of the Act, except that an alien who was paroled before April 1, 1997, or an alien who was granted advance parole which the alien applied for and obtained in the United States prior to the alien's departure from and return to the United States, shall not be considered an arriving alien for purposes of section 235(b)(1)(A)(i) of the Act.

8 C.F.R. 1.1(q).

habits, associations, and activities, and other information the Attorney General considers appropriate," and "to obey reasonable written restrictions on the alien's conduct or activities that the Attorney General prescribes for the alien." See also 8 C.F.R. 241.13(h) (setting forth conditions of release). An alien who fails to comply with Section 1231(a)(3) may be imprisoned. 8 U.S.C. 1253(b). Thus, as the Court has recognized, "the choice * * * is not between imprisonment and the alien 'living at large,'" but "between imprisonment and supervision under release conditions that may not be violated." *Zadvydas*, 533 U.S. at 696.

Congress has authorized the Executive to detain or remove suspected terrorists in numerous other statutes. For example, Section 1226a, enacted as part of the PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001), authorizes the Attorney General to certify that he "has reasonable grounds to believe" that an alien is engaged in terrorist activity or other activity threatening the national security. 8 U.S.C. 1226a(a)(3). Upon such a certification, the alien must be taken into custody and may be held without charge for up to seven days, after which the government must begin removal proceedings or bring criminal charges against the alien. 8 U.S.C. 1226a(a)(5). Subsection 1226(a)(6) specifically authorizes the continued detention of certain individuals where "removal is unlikely in the reasonably foreseeable future" and national security concerns are potentially implicated. And, under interim regulations issued in the wake of September 11, 2001, the government can detain aliens without charge for 48 hours and continue detention for an "additional reasonable period of time" under "emergency or other extraordinary circumstances." 8 C.F.R. 287.3(d).

Furthermore, 50 U.S.C. 21 authorizes the apprehension and detention of "alien enemies," meaning the citi-

zens, natives, and subjects of a foreign government with whom the United States is at war or which has perpetrated, attempted, or threatened an invasion or incursion against the United States. [3] This statute "include[s] within its ambit all aliens who by reason of ties of nativity or allegiance might be likely to favor 'the hostile nation or government' and might therefore commit acts dangerous to our public safety if allowed to remain at large." *United States ex rel. Schwarzkopf* v. *Uhl*, 137 F.2d 898, 902 (2d Cir. 1943).

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[3] 50 U.S.C. 21 provides:

> Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized, in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed, on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found necessary in the premises and for the public safety.

Likewise, 50 U.S.C. 23 authorizes federal courts to cause alien enemies deemed to be a "danger [to] the public peace or safety" to be apprehended and, after a full examination and hearing, to order such aliens to be removed, "and to imprison, or otherwise secure such alien, until the order which may be so made shall be performed." See also, *e.g.*, 8 U.S.C. 1226(c)(1)(A) (authorizing custody of aliens who are inadmissible or deportable for having committed terrorist acts as defined in Section 1182(a)(2) or 1227(a)(2)); 8 U.S.C. 1537 (provisions for the removal and detention of alien terrorists).

The government disputes the adequacy of these provisions on the ground that (1) they "address security risks posed by particular individuals," but "do nothing to address security risks that are created by the policies of foreign governments," Gov't Br. 41 n.21; (2) they do nothing to protect the nation on a "day to-day basis" from "the lawlessness of ordinary criminals," *id.* at 42 n.21; and (3) "due to proof difficulties or the sensitivity of using classified information, the government may, at times, find it more expedient to exclude an individual based on his criminality or other factors than to attempt to prove his status as a terrorist," *id.*

These rationales for distinguishing between admitted and arriving aliens are unpersuasive. The government does not explain why the statutory mechanisms described above are sufficient to guard against aliens acting on their own initiative but insufficient to guard against aliens sent to the United States by foreign governments or terrorist groups to do harm. In both cases the risks are posed by individuals, and in both cases the risks posed by admitted and arriving aliens would appear to be the same. Cf. *Zadvydas*, 533 U.S. at 691 ("The provision authorizing detention does not apply narrowly to a small segment of particularly dangerous individuals,

say, suspected terrorists, but broadly to aliens ordered removed for many and various reasons, including tourist visa violations." (internal quotation marks and citation omitted)).

The government similarly does not explain why its interest in preventing "the lawlessness of ordinary criminals" (see Part III, *infra*) or its need for "expediency" is different in the case of admitted and arriving aliens. The Court in *Zadvydas* rejected both of these interests as a basis for interpreting Section 1231(a)(6) to authorize indefinite detentions. The government offers no sound reason to accept them here.

The government says that it would prefer to be spared the burden of showing that any particular alien detainee is a threat to national security or public safety. But where "the only special circumstance present is the alien's removable status itself," that circumstance "bears no relation to a detainee's dangerousness." *Zadvydas*, 533 U.S. at 691-92. "Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government." *INS* v. *Chadha*, 462 U.S. 919, 944 (1983). The Court has "upheld preventive detention based on dangerousness only when limited to specially dangerous individuals and subject to strong procedural protections." *Zadvydas*, 533 U.S. at 690-91.

The government asserts that the authority to detain arriving aliens indefinitely is "an essential attribute" of our sovereignty (Gov't Br. 12) and critical to "the protection of the United States' national interests" (*id.* at 41 n.21). This assertion is undermined, however, by the example of other nations that do not recognize a distinction between arriving and admitted aliens in respect of such authority. For example, in *Tan Te Lam* v. *Superintendent of Tai A Chau Detention Center*, the United Kingdom's Privy Council ordered the relief from detention of Vietnamese asylum seekers who had been detained upon arrival in Hong Kong and had been denied refugee status but who could not be repatriated to Vietnam. [1997] A.C. 97 (U.K. Privy Council). The Council affirmed principles limiting "the statutory power of detention pending removal" articulated in an earlier case that involved the detention of a deportable alien who had entered the U.K. lawfully and been given indefinite leave to stay prior to his criminal convictions. *Id.* at 111 (citing *Regina* v. *Governor of Durham Prison, Ex parte Hardial Singh* [1984] 1 W.L.R. 704). Without distinguishing between the Vietnamese asylum seekers who had not been "admitted" and the deportable alien in *Hardial Singh*, the Privy Council confirmed that "if it becomes clear that removal is not going to be possible within a reasonable time, further detention is not authorized." *Id.* The Council further stated that "the courts should construe strictly any statutory provision purporting to allow the deprivation of individual liberty by administrative detention and should be slow to hold that statutory provisions authorize administrative detention for unreasonable periods or in unreasonable circumstances." *Id.*

Similarly, in Canada, release may be ordered after 120 days regardless of the alien's status if the alien is not shown to be a national security threat or a threat to the safety of persons. *Suresh* v. *Canada*, [1998] F.C. 192. In Canada, release is required after 120 days if the individual is not shown to be a national security threat or a threat to the safety of persons. *Suresh* v. *Canada*, [1998] 4 F.C. 192. And in the Netherlands, the limit on detention of unremovable aliens is 28 days. See Netherlands Aliens Act 2000, Articles 57-59.

In short, the government has not demonstrated that national security interests justify interpreting Section 1231(a)(6) to authorize indefinite detention of removable

arriving aliens based solely on their status. If Congress should find the mechanisms that it has already established insufficient to protect national security, it may appropriately augment them. Cf. *Zadvydas*, 533 U.S. at 695 ("[W]e nowhere deny the right of Congress to remove aliens, to subject them to supervision with conditions when released from detention, or to incarcerate them where appropriate for violations of those conditions * * *.").

B. Interpreting Section 1231(a)(6) as in *Zadvydas* will not precipitate a flood of refugees.

The government contends that interpreting Section 1231(a)(6) as in *Zadvydas* will encourage foreign governments to send their unwanted citizens to the United States, and then refuse to allow them back. *E.g.*, Gov't Br. 41. Although the government advanced similar concerns in *Zadvydas*, see Gov't Br. 36-37, *Zadvydas* v. *Underdown*, 533 U.S. 678 (2001) (No. 99-7791), the government does not claim here that the Court's ruling in that case led to such "strategic" behavior by foreign governments.

The government has offered no basis for its assumption that the prospect of indefinite detention under the statute can deter such forced migration. If a foreign government wishes to rid itself of social undesirables by dispatching them to the United States, it is difficult to see why the fate of such individuals, once here, would be a concern.[4] The government also provides no support for its

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[4] That Cuba may have engaged in such behavior, see Gov't Br. 39-41, does not indicate that other countries will follow suit. Cuba stands on an unusual footing: It is only 90 miles from our shores; it has a government only too happy, as a matter of ideology, to disgorge social undesirables; and Congress (continued)

speculation that foreign governments will view a lack of indefinite detention authority as an invitation to infiltrate this country with terrorist operatives; and in any event, as discussed in Part I, Congress has already established mechanisms to meet this concern and may augment those mechanisms if warranted.

The government also contends that interpreting Section 1231(a)(6) as in *Zadvydas* will encourage would-be immigrants to "undertak[e] treacherous voyages to the United States in ramshackle boats * * * that are so unseaworthy as effectively to preclude the government from turning the aliens back." Gov't Br. 42. Why the United States would consider itself compelled to force these migrants to return in unseaworthy vessels is unclear. Moreover, it is far-fetched to postulate that would-be immigrants, in deciding whether to come to this country, take into account the possibility that committing crimes here could result in indefinite detention by immigration authorities. There is also no reason to suppose that individuals desperate enough to risk "life-endangering migrations," *id.*, would be deterred by the possibility of indefinite detention, especially if—as in the case of the Mariél refugees—the individuals are welcomed into the

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had enacted legislation (the Cuban Adjustment Act of 1966 and the Refugee Education Assistance Act) that provides special incentive for Cubans to attempt to migrate to the U.S. See Amicus Br. of ACLU Supporting Petitioner, *Benitez* v. *Mata*, No. 03-7434 ("ACLU Br.") 21-23, 25-30; Amicus Brief of Florida Immigrant Advocacy Center and Rafael Penalver Supporting Petitioner, *Benitez* v. *Mata*, No. 03-7434 ("FIAC Br."); Part III, *infra*. It is entirely speculative, moreover, whether President Castro would have been deterred by the prospect that the Mariél refugees would be detained indefinitely rather than paroled into the United States.

country by the President and granted parole with the intent that the parole would lead to resettlement and lawful permanent residence. Finally, most individuals who arrive on our shores but are denied asylum would continue to be removable to their countries; only in the rare case will their country not accept them back. Those cases are likely to be rare because our government has sufficient diplomatic leverage with most foreign governments to induce recalcitrants to allow their citizens to return.

C. The crime-prevention rationale rejected in *Zadvydas* should be rejected here as well.

The government contends that indefinite detention authority would serve its interest in preventing future criminal activity by arriving aliens—both by incapacitating "recidivist criminal aliens" "whom the political Branches have deemed unfit for release and who have statistically high rates of recidivism," Gov't Br. 34-35, and by giving arriving aliens "incentives for compliance" with our laws, *id.* at 36. The government argues that unless it can use the possibility of indefinite detention as "enforcement leverage," "[c]riminal aliens may quickly deduce that the availability of parole will be little affected by their misconduct." *Id.*

The key to this argument is the power that indefinite detention authority would give "the political Branches" to incapacitate and deter. But the criminal justice system is already able to incapacitate criminal aliens for the length of their criminal sentences and then to detain them for a period reasonably necessary to effectuate their removal if possible (a period that, under *Zadvydas*, can in some cases be more than six months). The government has not explained how vesting "the Political branches" with indefinite detention authority would materially achieve greater incapacitation and deterrence

than the criminal justice and immigration processes already achieve.

The Court with good reason rejected this same argument in *Zadvydas*. Like Respondent, Zadvydas was a convicted recidivist ordered removed because of his criminal history. See *Zadvydas*, 533 U.S. at 684. As here, the government argued that Zadvydas's indefinite detention was justified by the government's interest in "preventing danger to the community." *Id.* at 690 (quoting Gov't Brief in No. 99-7791, at 24). The Court rejected this position, however, stating that it has "upheld preventive detention based on dangerousness only when limited to specially dangerous individuals and subject to strong procedural protections." *Id.* at 691. The Court held that indefinite detention is impermissible without an individualized showing of special dangerousness and that status as an unremovable alien did not render an individual particularly dangerous. *Id.* at 695-96. As *Zadvydas* illustrates, it is one thing to dispense with individualized determinations when the government proposes to detain an alien only "for the brief period necessary for his removal proceedings." *Demore* v. *Kim*, 538 U.S. 510, 517-21 (2003), but quite another thing when the government proposes to detain an alien indefinitely—potentially for the rest of his life.

Unable to argue that arriving aliens *as a class* are more likely to be "specially dangerous" than resident aliens, the government argues that the "basic purpose" of detention for removable resident aliens is "to assure the alien's presence at the moment of removal," *Zadvydas*, 533 U.S. at 699, whereas the "'basic purpose' of detaining aliens who are stopped at the border and then formally excluded * * * is exclusion itself." Gov't Br. 33. But the "exclusion purpose" rationale is not logically limited to aliens stopped at the border and formally excluded but

applies to all deportable aliens who no longer have the right to remain in the U.S. Once an alien is detained for removal, the purpose is removal, regardless of the alien's initial status.[5]

The government's assertion that the sovereignty concerns implicated here are different from those implicated in *Zadvydas* cannot be credited because the government argued that sovereignty concerns militate in favor of the indefinite detention of aliens *regardless* of the alien's class:

> The United States' interests in protecting its national sovereignty, in not allowing recalcitrance on the part of another country in accepting the return of its citizens to dictate the presence of foreign nationals at large in this country, and in protecting our society from any such foreign nationals who would pose a danger if released, are the same in the case of an alien under a final order of deportation, regardless of his prior residency here, as they are in the case of an alien who has never resided here. The

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[5] The government acknowledged the point in *Zadvydas*:

> The court of appeals in this case reasonably held that, for purposes of due process scrutiny of immigration detention, *petitioner stands on essentially the same footing as an excludable alien who has been ordered removed after seeking to enter the United States*. The alien's lack of a right to be present in the United States, and the government's countervailing interests in protecting against danger to the community and effectuating removal, *are the same in the two situations*.

Gov't Br., *Zadvydas* v. *Underdown*, 533 U.S. 678 (2001) (No. 99-7791), at 35 (emphasis added).

> only act remaining to be carried out in both cases is the actual removal of the alien.

Gov't Br., *Zadvydas* v. *Underdown*, 533 U.S. 678 (2001) (No. 99-7791), at 36; *id.* at 37-38 n.17.

Under the government's reasoning in *Zadvydas*, no distinction should be drawn between arriving and admitted aliens with respect to the government's crime-prevention interests.

II. TREATING ALIENS PAROLED INTO THIS COUNTRY LIKE ALIENS "STOPPED AT THE BORDER" IS ARTIFICIAL AND UNJUSTIFIABLE.

Respondent, was not "stopped at the border" but paroled into the United States and given the prospect of permanent residence. President Carter paroled him and other Mariél refugees in 1980 as part of a government policy to foster the resettlement and lawful permanent residence of such aliens. See ACLU Br. 21-23, 25-30; FIAC Br. 16-30. From a practical standpoint, Respondent and other Mariél refugees present no greater threat to the government's asserted interests than resident aliens.

The government, however, seeks to avoid a ruling limited to long-time parolees like Respondent and to require the Court, in deciding Respondent's case, to reach the distinct questions raised by aliens stopped at the border. The government does so by warning that, if it may not subject to indefinite detainment parolees who cannot be removed, it would become less likely to parole aliens into the country in the first place. Gov't Br. 22-23. It is hard to imagine, however, that a humane government would thus punish the vast majority of harmless aliens seeking to be paroled into the United States, denying them parole because it cannot detain indefinitely the relatively

small percentage of paroled aliens whom the government might have cause to remove but who cannot be removed.[6]

Such a punitive policy seems particularly unlikely because the government would not be required to release—indeed, it would be prohibited from releasing—any parolee who could not be removed and was considered a potential threat to national security. Sec. 1226a. See also Part I, *supra*. Thus, there would be no sound reason for the government to feel constrained from exercising its parole authority in the future if the Court were to interpret Section 1231(a)(6) here as it did in *Zadvydas*.

CONCLUSION

The judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

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[6] The overwhelming majority of the 120,000 Mariél parolees are law abiding. Only a very small percentage violated the conditions of their parole and were ordered removed. Of these, approximately 750 are being subjected to indefinite imprisonment. Gov't Br. at 8.